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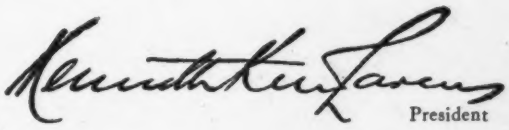
THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal exclusively with members of the bar.

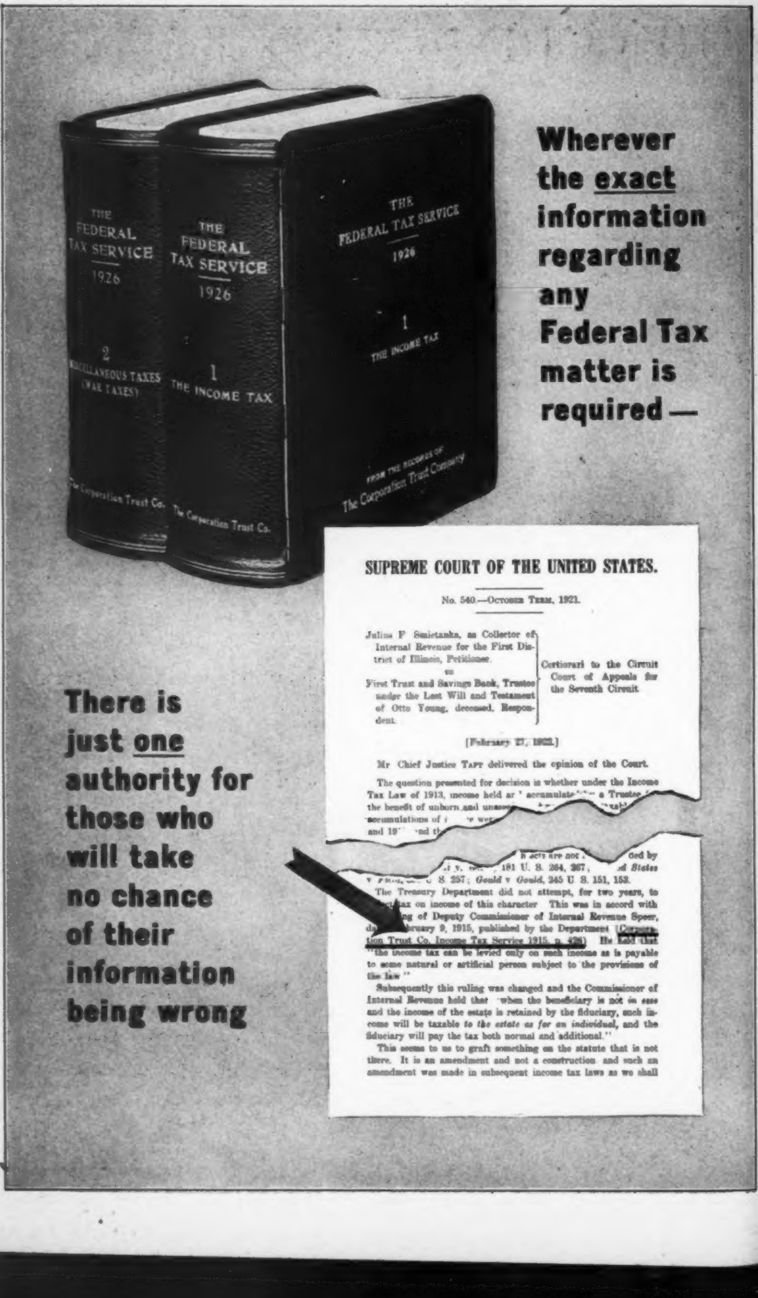
Attention is directed to the Delaware case on page 224 of this number of The Corporation Journal, involving matter of dividends of a mining corporation.

On page 221 will be found decision of the Court of Appeals of Maryland involving construction of the Uniform Stock Transfer Act as applied to a pledge of stock.

Attention is also directed to Federal Tax matters on page 234. Here will be found outstanding features of a few of the many interesting rulings and decisions during the month ending September 24, reported in this company's Federal Tax Service.



President


THE FEDERAL TAX SERVICE 1926
2 MISCELLANEOUS TAXES (WAR TAXES)
The Corporation Trust Co.
THE FEDERAL TAX SERVICE 1926
1 THE INCOME TAX
The Corporation Trust Co.
THE FEDERAL TAX SERVICE 1926
1 THE INCOME TAX
FROM THE RECORDS OF The Corporation Trust Company
Wherever the exact information regarding any Federal Tax matter is required —
There is just one authority for those who will take no chance of their information being wrong
SUPREME COURT OF THE UNITED STATES.
No. 540.—October Term, 1921.
Julius F Smietanka, as Collector of Internal Revenue for the First District of Illinois, Petitioner.
vs
First Trust and Savings Bank, Trustee under the Last Will and Testament of Otto Young, deceased, Respondent.
Certiorari to the Circuit Court of Appeals for the Seventh Circuit
Mr Chief Justice Taft delivered the opinion of the Court.
The question presented for decision is whether under the Income Tax Law of 1913, income held and accumulated
the benefit of unborn and
accumulations of
181 U. S. 264, 267,
S. 257; Gould v Gould, 245 U S. 151, 153.
The Treasury Department did not attempt, for two years, to
tax on income of this character This was in accord with
of Deputy Commissioner of Internal Revenue Speer,
1915, published by the Department (Corporation Trust Co. Income Tax Service 1915, p. 426). He held that
"the income tax can be levied only on such income as is payable to some natural or artificial person subject to the provisions of the law."
Subsequently this ruling was changed and the Commissioner of Internal Revenue held that "when the beneficiary is not in esse and the income of the estate is retained by the fiduciary, such income will be taxable to the estate as for an individual, and the fiduciary will pay the tax both normal and additional."
This seems to us to graft something on the statute that is not there. It is an amendment and not a construction and such an amendment was made in subsequent income tax laws as we shall

THE CORPORATION JOURNAL

Edited by John H. Sears of the New York Bar

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The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August and September. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices.

When it is desired to preserve the Journal in a permanent file, a special ring binder will be furnished at cost ($2) and thereafter each copy will be punched to fit the binder.

The Corporation Trust Company, publisher of the Journal, was founded in 1892 to gather and compile for lawyers official information in regard to the laws, regulations, court decisions and local practice in various states relating to the organization, qualification, taxation and maintenance of business corporations; and to assist attorneys in the details of organization or qualification in any state.

For the conduct of this branch of its business the company now has offices and representatives in every state and territory of the United States and in every province of Canada. It furnishes complete and up to the minute information, precedents and assistance in drafting all required papers for incorporation or qualification in any state, territory or province, and under the attorney's direction performs all necessary steps, and furnishes the statutory office or agent required. This service is rendered to members of the bar only.

Because of the unique organization thus built up, especially trained and experienced in the gathering and furnishing of exact official information, it naturally fell to the lot of The Corporation Trust Company to originate and furnish, as they became needed, The Federal Tax, Federal Reserve Act, Federal Trade Commission, Supreme Court, and New York Tax Services; The Corporation Tax Service, State and Local; The Stock Transfer Guide and Service (covering all requirements under the various state Inheritance Tax and Federal Estate Tax Laws, the various state probate laws, and the Uniform Requirements of the New York Stock Transfer Association, relating to the transfer of corporation securities); The Congressional Service (covering proposed legislation in Congress); and special services to lawyers and their clients having business to take up with committees, commissions, boards or officials at Washington.

Incorporated under the banking law of the State of New York, and its affiliated company incorporated under the trust company law of the State of New Jersey, the company is also qualified to act for corporations as Transfer Agent or Registrar of their securities, or as Trustee, Custodian of Securities, Escrow Depositary, or Depositary for Reorganization Committees. As an adjunct to these services it also assists counsel in procuring the listing of securities on the New York Stock Exchange.

Details of any of these services will gladly be furnished at any of the company's offices.

Uniform Stock Transfer Act

A decision of importance to banks, trust companies, etc., has been handed down by the Court of Appeals of Maryland, in the case of Jenkins v. Continental Trust Co., 133 Atl. 610. This case involved a construction of the Uniform Stock Transfer Act as applied to a pledge of stock. The facts and the holding follow.

A stockholder of the United States Fidelity & Guaranty Company, maintaining a trading account with a stock brokerage firm, was called upon for cash or securities as additional margin. He, accordingly, deposited a certificate for 111 shares of the above named company with the brokers and received their receipt, and at the same time signed the power of attorney on the back of the certificate. The brokers, later and without the knowledge of the stockholder, pledged the certificate as collateral for a loan, guaranteeing the signature, and the question presented is whether the trust company receiving the stock as pledge acquired such title, that its title thereto was superior to any title of the stockholder, in such manner that the acceptance of the pledge and the subsequent sale thereof was not a conversion of the shares as against the stockholder. The Court of Appeals of Maryland in holding the pledge of the stock good as against the stockholder says the certificate representing the stock in question was delivered with a blank power of attorney to sell, assign, and transfer the same written thereon by the person appearing by the certificate to be the owner of the shares of stock. The stock was taken in pledge in the usual course of business. And, though the indorsement was fraudulently procured, the certificate was transferred to the pledgee in good faith, for value, without notice of any fact making the transfer wrongful. The power of attorney was to sell, assign, and transfer the stock represented by the certificate; and this power, under the express provisions of the Uniform Stock Transfer Act authorized the pledging of the stock. By the statute, title to stock passes by an indorsement containing such power. It is the method particularly prescribed by the statute for the transfer of stock, and it would be unreasonable to assume that the statute was providing only for a restrictive assignment or transfer. That a right to sell includes the right to pledge is further shown by the provision of the statute where it is said that the word "purchaser," when used in the act, "includes mortgagee and pledgee." Such construction makes the law of Maryland conform to the decisions of other states upon this question. [Robert France and Frank B. Ober, both of Baltimore (Janney, Ober, Slingluff & Williams, of Baltimore, on the brief), for appellant. Charles McHenry Howard, (of Venable, Baetjer & Howard, of Baltimore) and James Piper, (of Piper, Carey & Hall, of Baltimore), for appellee.]

Domestic Corporations

Alabama.

Certificate of amendment which does not state amount of two classes of preferred stock intended to be issued held unauthorized. In connection with a certificate of amendment to a corporate charter, the Supreme Court of Alabama says that the certificate adopted and passed by the owners of two-thirds of the stock properly states the proportion of the two different kinds of stock, common 10,000 shares and preferred 5,000 shares, but it creates two classes of preferred stock, one class to bear $7 per share dividend per annum, and to be redeemed by paying $102 per share for it, and the other $6, and to be redeemed by paying $105 per share for it, and authorizes the directors to issue 5,000 shares of either class or to divide the 5,000 shares between the two classes, without stating the proportion of each class as the statute directs. This does not comply with the statute and the certificate is therefore unauthorized. It fails to state the amount of the two classes of preferred stock to be issued. It should have directed the entire 5,000 shares of preferred stock to bear $7 dividend or $6 dividend, or it should have stated what proportion of the 5,000 shares would bear $7 dividend and what proportion would bear $6 dividend. This should have been decided by and received the consent and approval of the owners of two-thirds of the stock, and it should have been stated or expressed in the proposed certificate of amendment of the charter, and should not have been left to the discretion of the directors. The proposed certificate of amendment of the charter of the corporation is unauthorized, by the statute, because the amount—the proportions—of the two classes of preferred stock intended to be issued is not stated or expressed therein. Stabler v. Union Coal Co. et al., 108 So. 755. C. R. Wiggins, of Jasper, for appellant. A. F. Fite, of Jasper, for appellees.

Arkansas.

Mere signing of articles does not constitute corporation de facto. A mere signing of articles of incorporation is not a substantive step in the act of incorporation under the statute. The signing of the agreement constitutes merely a joint obligation of the parties to form a corporation, but is not a step in the formation of it. Therefore, in the instant case, a voluntary, unincorporated association, in effect a partnership, was created. The Supreme Court of Arkansas, in making the above statement relies on the case of Rainwater v. Childress, 121 Ark. 541, to the effect that to constitute a corporation de facto, there need not be a strict or substantial compliance with the statute, but there must be a colorable compliance, that is, there must be color of a legal organization under the statutes and user of the supposed corporate franchise in good

faith. Harris v. Ashdown Potato Curing Ass'n et al., 284 S. W. 755. Seth C. Reynolds, of Ashdown, for appellant. Du Laney & Steel and Shaver, Shaver & Williams, all of Ashdown, for appellees.

California.

Assessment. Transfer of certificate on books essential. Only those who have entered into a contractual relationship with a corporation are personally liable under an assessment. Such relationship and the liability incident thereto are limited and confined to those who are registered on the books of the corporation as stockholders. The relation between stockholder and corporation is one of contract, and can rise only when a party has consented to become a stockholder. It must appear that the minds of the parties have met, that the one to whom the stock was issued agrees to be and become a stockholder in the corporation, with the privileges and responsibilities of that relation, and that the corporation accepts him as such. A transfer on the books therefore is essential to a novation of the contract of membership under the statute. The District Court of Appeals of California (First District, Division 1) in applying the above says, that the mere fact that defendant had the stock distributed to her as sole legatee under the will and receipted for and retained the certificate did not constitute her a stockholder. Transfer never having been made on the books, she did not enter into any contractual relation with the corporation, and it has no cause of action against her to enforce a personal liability for an unpaid assessment. Berkeley Hillside Properties Co. v. Kelly, 247 Pac. 600. R. M. F. Soto, of San Francisco, for appellant. Harrison S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, for respondent.

Voting Agreement. In an action to determine the validity of an election of directors reliance was placed upon a voting agreement, wherein one of the plaintiffs agreed with certain of the defendants that one of the defendants should vote the stock at all meetings of the corporation in accordance with the wishes of the majority of the signers of the agreement. The term of the agreement was fixed at 12 years. The District Court of Appeals of California (First District, Division 2) in connection with this agreement says that under the statute a proxy given for a term in excess of 7 years is invalid and one for any term is revocable at the pleasure of the stockholder. The parties, therefor, entered into an agreement in violation of the express terms of the statute. The Court further found that nearly a year prior to the date of the stockholders' meeting in question, written notice of the revocation of the agreement had been given. Simpson et al. v. Nielson et al., 246 Pac. 342. J. F. Riley, H. S. Young, and Bert F. Rabinowitz, all of San Francisco, for appellants. John H. Riordan, of San Francisco, for respondents.

Colorado.

On failure to file annual report director liable only for debts contracted during year next preceding time when it should have been made and not for debts existing. This is an action against a director of a corporation to recover for a debt of the corporation, under a statute which makes a director and other officers liable for all debts of such corporation contracted during the year next preceding the time when the annual report should have been made. The complaint alleges the failure to file the annual report which should have been filed within 60 days after January 1, 1923. It is then sought to recover installments of rent due at different times in the year 1923, due under a lease entered into by the corporation in the year 1921. The Supreme Court of Colorado in passing on the point raised upholds the contention that there was no absolute debt until 1923, with reference to the installments of rent sued for, but further says: "The statute, however, imposes the liability, not for debts existing, but for debts 'contracted,' within the year. The question is, When was this debt, springing into existence in 1923, contracted? Obviously it was contracted at the time the agreement respecting it was made, and the only agreement that was made was the lease, and that was executed in 1921. That disposes of the case, and defendant is not liable because the debt, though existing in 1923, was contracted in 1921, which was more than one year preceding the time of the default in the filing of the annual report. Washington Securities Co. v. Goodstein, 246 Pac. 278. Poe, Falknor & Falknor, of Seattle, Wash., and Danforth & Kavanagh, of Denver, for plaintiff in error. Frederick Sass, of Denver, for defendant in error.

Delaware.

Declaration of dividend by mining corporation. The question in the present case is whether, there being a deficiency of net assets below its paid in or invested capital, the directors may in the process of calculating the net profits of a mining or wasting asset corporation for dividend purposes, particularly on its common stock, calculate the same by subtracting from the gross amount received for its finished product, the cost of mining, milling, marketing the same and overhead charges, without charging off anything for the value of the ore taken out. Certain preferred stockholders seek to enjoin the payment of any dividends on the common stock until there shall have been set up and accumulated a reserve equal to the sum by which the invested capital has been impaired by the depletion of the ore bodies and further from paying any dividends on the common stock when such payment would impair the invested capital. The Court of Chancery of Delaware in passing on the contention of the preferred stockholders says that it seems clear that on fundamental principles of right and justice, the preferred stockholders possessing a prior claim on capital assets have an equity which entitles them to protection against the proposed whittling away of those assets for the benefit of the less favored common stockholders. The Court further says that wasting asset corporations live on themselves;

they thrive by consuming their capital. Every ton of ore taken from a mining company's mine and every barrel of oil taken from an oil company's well depletes the capital pro tanto. If capital assets consisting of ore are taken out of the ground, their transmutation into the form of a pure metal does not destroy their character as capital. If it be conceded that the proceeds from their sale, less only the cost of mining, milling, marketing and overhead, may be regarded as available for dividends, the result nevertheless remains, that dividends are being paid in part at least from capital, there being no charge-off for the value of the removed ore. Wittenberg et al. v. Federal Mining & Smelting Co., 133 Atl. 48. Robert H. Richards, of Wilmington, for complainants. Andrew C. Gray (of Ward, Gray & Ward), of Wilmington, and Elihu Root, Jr., of New York City, for defendant.

Dissolution. Directors continue as such. Not replaced by receiver except for reason shown. In a bill brought for the appointment of a receiver for a dissolved corporation, the Court of Chancery of Delaware says that upon the dissolution of a corporation, the directors were formerly constituted by sections 41 and 42 of the General Corporation Act, trustees with certain powers for the purpose of settling the corporation's affairs. The Chancellor was authorized by section 43 upon the application of a creditor or stockholder to continue the directors of dissolved corporations as trustees, or to appoint a receiver. But a receiver would not be appointed under section 43 to take over from the director-trustees the duty of winding up except for reason shown, or by consent of the directors. (Cahall v. Lofland et al., 107 Atl. 769.) Sections 41 and 42 have now been repealed by section 10, c. 112, vol. 34, Laws of Delaware. So that now the directors are no longer continued as trustees, though by an amendment to section 43 they may be appointed to act as such or a receiver may be appointed. Upon the dissolution of a corporation, its existence is continued by section 40 as heretofore for the space of three years for the purpose of gradually settling and closing its business. The directors, therefore, now that sections 41 and 42 are repealed, continue as directors, not as trustees, to close up the corporate business. The same considerations which prompted the Chancellor in the cited case to refuse to displace the directors as trustees in dissolution by a receiver except for reason shown, suggest that the directors as directors in dissolution should likewise be not similarly displaced except for reason shown. Carle v. International Clay Products Co., 132 Atl. 892. George N. Davis, of Wilmington, and A. C. Cass, of New York City, for complainant. Robert H. Richards, of Wilmington, and Ashton L. Worrall, of Philadelphia, Pa., for defendant.

New York.

Voting trust. An action was brought to restrain certain officers and directors of the Bank of America from voting and the bank from permitting to be voted, stock of the bank, held by the officers and directors as voting trustees under a voting trust agreement. The

trustees held a majority of the stock of the bank which by the agreement was to be transferred of record to the trustees and voted for a period of ten years. The New York Supreme Court (Special Term) held the agreement invalid on the ground of public policy, irrespective of whether it had been improperly used. (See The Corporation Journal, No. 145, April, 1926.) The New York Supreme Court, Appellate Division (First Department), however, reverses that decision and holds that the voting trust agreement is not against public policy and invalid. The decision of the lower court seems to have been based on the fact that stock of a banking institution was involved and that it was against the declared public policy of the state to permit stockholders of a bank, retaining all beneficial interest in their stock to turn over the voting powers even by voting trust agreement, to the officers and directors. Tompers v. Bank of America, et al., National Liberty Insurance Company of America v. Same. 217 New York Supp. 67. Rushmore, Bisbee & Stern, of New York City (Charles E. Hughes, of New York City, of counsel, and Henry Root Stern and Bertram F. Shipman, both of New York City, on the brief), for appellants. Hirsch, Sherman & Limburg, of New York City (Henry L. Sherman and Frank H. Stewart, both of New York City, of counsel, and Abel E. Blackmar and Louis S. Posner, both of New York City, on the brief), for respondents.

Oregon.

Right of stockholder to inspect corporate books and records. This is a mandamus proceeding instituted by a stockholder to compel an inspection of the corporate books and records. The application was refused by the company on the ground that the stockholder had an ulterior motive and purpose in demanding the inspection and that it would be inimical to the interest of the corporation to allow it. The Supreme Court of Oregon in passing on this point says that the right of examination is not limited by the statute to stockholders, but includes "any person interested therein and applying therefor." Nor is it provided that the purpose of the inspection be stated. Without doubt, a stockholder is an "interested person" within the meaning of the statute. The effect of the statute is to give stockholders an absolute legal right to inspect the books and records of a company in which they are interested. It was enacted for their protection. They are the owners of the corporate property. The directors and other officers of the corporation are their agents and trustees. Those who thus invest money may well investigate as to the manner in which it is being used, and the fact that this statutory right may result in abuse is in itself no reason for denying relief. That harm might result in subjecting corporate records to inspection by stockholders who are suspected of having sinister designs is generally more fanciful than real. When business is operated on a sound financial basis and the affairs of a company are conducted honestly and legitimately, seldom does harm result by turning on the light of day. So far as the strict legal right of inspection is concerned, it is immaterial what the motive or purpose may be. The right conferred is absolute and unconditional. The court further says

that because a stockholder has a strict legal right to an examination, it does not follow that he can resort to mandamus if he has an unlawful or wrongful purpose. In the instant case however, the writ was allowed as sufficient facts were not shown to support a finding that the inspection was unlawful or wrongful. Bernert v. Multnomah Lumber & Box Co. et al., 247 Pac. 155. John A. Collier and Earl F. Bernard, both of Portland, (Collier, Collier & Bernard, of Portland, on the brief), for appellants. W. P. La Roche, of Portland (L. E. Crouch and J. F. Reilly, both of Portland, on the brief), for respondent.

Corporate name. In a suit to enjoin the use of a corporate name, the Supreme Court of Oregon holds that persons desiring to incorporate under a name they have previously used as the name of an organization not incorporated, are not barred from so doing because of the fact that others had incorporated under that name subsequent to the time they began to use it as the name of an unincorporated organization. If they were the first to use the name and to become known by it, they cannot be denied the right to incorporate under that name because others have adopted their name, and preceded them in incorporating under it. Any damage resulting to those first incorporating is chargeable to their folly in choosing a name already in use. In the instant case the plaintiff corporation incorporated in 1921, sought to enjoin the use of its corporate name. However, the evidence disclosed that the directors and other stockholders of the defendant corporation, had been for years engaged in business prior to the incorporation of the plaintiff corporation. Consequently the suit was dismissed. Umpqua Broccoli Exchange v. Um-Qua Valley Broccoli Growers, 245 Pac. 324. Ray B. Compton and Dexter Rice, both of Roseburg (Rice & Orcutt, of Roseburg, on the brief), for appellant. B. L. Eddy, of Roseburg, for respondent.

Foreign Corporations

Kentucky.

Contract held to create relation of seller and purchaser and not that of principal and agent. In an action by the J. R. Watkins Company to recover balance due for certain medicinal preparations it was contended that the contract was void, inasmuch as the corporation was an unqualified foreign corporation and the contract set up the relationship of principal and agent and not that of seller and purchaser. The Court of Appeals of Kentucky in refusing to accept this contention says that by its terms the contract is one of sale. It provides that it shall not be varied, changed, or modified in any respect except in writing executed by the parties. Its terms have never been changed by writing executed by the parties, and mere letters or old books on salesmanship, designating the seller as agent are not admissible to alter or change the terms of the contract. The purchaser may buy for cash or on credit. The amount

of sales depends on the resales by the purchaser, and the provisions that the purchaser shall canvass the territory and make reports of sales are reasonably necessary for the protection of the seller, and are not inconsistent with a contract of sale. Nor is the situation altered by the agreement of the seller to take back the undisposed of goods at the termination of the contract. For these reasons, and others that might be mentioned, the courts of other states with singular unanimity have decided that a contract like the one in question is a contract of sale and not of agency. Sinnett et al. v. J. R. Watkins Co., 282 S. W. 769. W. E. Aud, J. R. Higdon, and J. R. Hays, all of Owensboro, for appellants. Tawney, Smith & Tawney and E. D. Libera, all of Winona, Minn., and Slack, Birkhead & Slack, of Owensboro, for appellee.

Michigan.

Shipment of barrels on order taken in state by sales representative held interstate commerce. An unlicensed foreign corporation commenced this action against a domestic corporation to recover an amount claimed to be due on a consignment of barrels. It was shown that the foreign corporation first received the order from the Michigan Cooperage Company, a domestic corporation, through which, as its sales agent, it had sold quantities of its product in the state. The Supreme Court of Michigan in holding the transaction interstate commerce says that it does not appear that the foreign corporation maintained any office, warehouse, or place of business, or kept any supply of its output on hand anywhere in the state. It sold in Michigan only on orders for goods to be shipped from Cleveland. The Michigan Cooperage Company's relation with it in obtaining such orders were purely that of a sales representative or broker. When it received this order from the domestic corporation, it simply sent it to the foreign corporation at Cleveland, where the foreign corporation acted upon and accepted it, then invoiced, charged and shipped the carload of barrels direct to the domestic corporation, which received and kept the consignment. Cleveland Cooperage Co. v. Detroit Milling Co., 209 N. W. 144. Barbour & Martin, of Detroit, and James H. Baker, of Adrian, for appellant. Baldwin & Alexander, of Adrian, for appellee.

Unqualified foreign corporation may take assignment of one mortgage on land in state. In a suit to foreclose a real estate mortgage it was shown that the mortgage had been assigned to the Investment Bond & Mortgage Company of Toledo, Ohio. This assignment together with the mortgage notes, was sent to a bank in Toledo to turn over to the assignee upon payment of the amount due. This amount was paid in Toledo and the papers then delivered. Later the Investment Bond & Mortgage Company assigned the mortgage to the plaintiff in the present suit and it is contended that the corporation not having been domesticated had no capacity to take title to a mortgage covering Michigan land and therefore could convey none to the plaintiff. The Supreme Court of Michigan in refusing to accept this, says that if a foreign corporation is to carry on its business in Michigan, a certificate

of authority must be procured. Such is the plain mandate of the statute, but this does not prevent a foreign corporation, not carrying on its business in Michigan, from taking an assignment of one mortgage on land in the state. The applicability of the statute, requiring a certificate of authority, and rendering foreign corporations incapable of making valid contracts in the state if not operating under certificate of authority, depends entirely upon whether such corporation is carrying on its business in the state. The statute does not say that no business shall be done in the state by a foreign corporation except under certificate of authority, but does say that no foreign corporation shall carry on its business in this state without such certificate. Maxwell v. Hamond et al., 208 N. W. 443. Charles C. Stewart, of Detroit (John W. L. Hicks, of Detroit, of counsel), for appellant. Baldwin & Alexander, of Adrian, and Marshall, Melhorn, Marlar & Martin, of Toledo, Ohio, for appellee.

North Carolina.

Discussion as to what constitutes "doing business." The Supreme Court of North Carolina says that in determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the state, in which process is sought to be served, in order that jurisdiction may be exercised therein, for the purpose of carrying on its business in said state, and must have been within the state during the time such business was transacted. As a corporation may act only by its officers, agents or other persons authorized to act for it, or in its behalf, the presence within a state of such officers, agents or other persons, engaged in the transaction of the corporation's business therein, is generally held as determinative of the question. But no all-embracing rule as to what is "doing business" has been laid down. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite, and precise rules. In the last analysis the question is one of due process of law under the Constitution of the United States. Ivy River Land & Timber Co. et al., v. National Fire & Marine Ins. Co. of Elizabeth, N. J., 133 S. E. 424. Merrick, Barnard & Heazel and Mark W. Brown, all of Asheville, for appellants. Jones, Williams & Jones, of Asheville, for appellee.

Texas.

Sale of goods on consignment does not constitute "doing business." The General Electric Company, a New York corporation, appointed the Nunn Electric Company as one of its agents in Texas. Under the contract of appointment the company agreed to maintain on consignment with the agent a certain stock of goods, title to remain in the company until sold and to be sold only at such prices, upon such terms and under such conditions as might be established by the company.

The agent made monthly reports, was authorized to collect amounts due and was paid a compensation fixed on a percentage basis on the amounts received for goods sold. The Court of Civil Appeals of Texas held this to be "doing business" and dismissed a suit brought by the Southwest General Electric Company, as assignee of a claim of the General Electric Company. (See The Corporation Journal, No. 131, November, 1924, 263 S. W. 934.) The Commission of Appeals of Texas, Section B, now reverses that decision, holding that the contract contemplates that everything that is done in Texas under its terms in furtherance of the business authorized, is to be done by the Nunn Electric Company, who alone is transacting business in the state. There is nothing in the contract to bring the case within the rule that the foreign corporation maintains a stock of goods or wares in the state from which it makes sales directly, by consignment or otherwise. All its sales are by consignment under allowable limitation and regulations. Southwest General Electric Co. v. Nunn Electric Co., 283 S. W. 781. Fitzgerald & Hatchitt, of Wichita Falls, and Crane & Crane, of Dallas, for plaintiff in error. Weeks, Morrow & Francis, of Wichita Falls, for defendant in error.

West Virginia.

State auditor remains agent for foreign corporation after withdrawal, as to contracts made before. A foreign corporation on coming into West Virginia and engaging in business under authority granted it pursuant to statutes providing therefor, thereby consents to the provision of the statute making the state auditor its attorney in fact to accept service of process for it, and such consent extends to all actions on contracts made by it with citizens of the state while doing business under such authority, though it may have ceased to do business or have withdrawn from the state prior to the bringing of the action. The Supreme Court of Appeals of West Virginia further says that to hold otherwise would relieve the corporation of all obligations incurred while "doing business" in the state. Frazier v. Steel & Tube Co. of America, 132 S. E. 723. Minter & McNemar and Mark T. Valentine, all of Logan, for plaintiff in error. Chafin & Estep, of Logan, for defendant in error.

Wisconsin.

Installation of article. In an action brought by the Pfaudler Co., a foreign corporation, not licensed to do business in Wisconsin, to recover balance due upon the sale of two glass-lined condensing tanks, the Supreme Court of Wisconsin says that whether the agreement to erect or install an apparatus, device, or article brings it within the field of interstate commerce depends principally upon whether such erection or installation is a mere incident to an interstate transaction, or whether such erection or installation inherently is so intricate or complex that to include it within the purview of an intrastate transaction would amount to a regulation, restriction, or prohibition of interstate commerce. The Court after an examination of the leading cases applying

to installation, further says: "An examination also of the specifications as included in the contract will reveal that the tanks and appliances consisted of a great number of parts, all of which were designed to work in harmony with each other, so that the purposes of the articles could be efficiently accomplished. It also appears that the plaintiff was the sole manufacturer of the tanks, and of the mechanical parts connected therewith. The installation and connection, by reason of the delicate and technical nature of the article, and the complexity of the mechanism, were such that a refusal to classify the agreement as one coming under the head of interstate commerce would amount to a regulation, restriction or prohibition of interstate commerce. We therefore conclude that the lower court properly interpreted the contract as one involving an interstate transaction." Pfaudler Co. v. Westphal, 209 N. W. 700. J. H. Schnorenberg, of Hartford, and M. L. Lueck, of Beaver Dam, for appellant. Quarles, Spence & Quarles, of Milwaukee (Arthur Wickham, of Milwaukee, of counsel), for respondent.

Taxation

Louisiana.

Arresting of movement of interstate commerce. The United States Circuit Court of Appeals (Fifth Circuit) makes the following statement relative to the taxation of a commodity arrested in its movement as interstate commerce: "The opinion in the case of Champlain Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195, clearly states the distinction between the arresting of the movement of a commodity in interstate commerce for its safety and protection from dangers due to natural causes to which it is exposed in its journey, and the intentional detention of it for the beneficial purposes of the owner, who did not from the beginning expect it to have an uninterrupted movement to its ultimate destination, but arranged for the halting of it until its further movement could be made to suit his convenience. Such an intentional detention for the purposes just mentioned renders the commodity subject to be taxed at the place where it is stopped. It plainly appears that the tanks at Dubberly were intended and habitually used as a depot or storage place for so much of the oil as, in the absence of any obstruction or mishap to the line going south, had to be detained there until it was sold or the movement of it could be resumed. It also appears that those tanks were used as a means of stopping and holding oil for the business purposes and convenience of the appellant; oil being moved from that place as and when appellant chose to have it moved. We think that the continuity of the interstate journey of such oil was so broken, and it so came to rest, as to be subject to local taxation." Gulf Refining Co. of Louisiana v. Phillips, Tax Collector. Same v. Sandlin, 11 F. (2d) 967. J. S. Atkinson, of Shreveport, (Frederick E. Greer, of Shreveport, and D. Edward Greer, of Houston, Tex. on the brief), for appellant. Robert A. Hunter, of Shreveport, Harry P. Sneed, of New Orleans, and D. W. Stewart, of Minden, (R. H. Lee, of Minden, on the brief), for appellees.

Federal Tax Matters

Outstanding features of a few of the many interesting rulings and decisions during the month ending September 24 in The Federal Tax Service of The Corporation Trust Company are briefly summarized here. The complete reports should be examined to determine the extent of their application. These decisions and rulings, it must also be remembered, are not necessarily final. The citations are all to the above named Service.

Treasury Decision 3921, setting forth the Commissioner's interpretation of the law as to sales of personal and real property on the installment plan and deferred-payment sales of real property is, in effect, a regulation under the 1926 Act and an amendment of the regulations under the 1918, 1921 and 1924 Acts—an exposition, in the light of the new law, of the Government's attitude as to installment plan accounting by dealers and the determination of gain on the sale of real property by any taxpayer (Part 1, ¶4319). . . . The United States District Court for the Southern District of New York holds that an amount paid by direction of will to an executor for acting as such "in full payment of all commissions, percentages, and allowances by statute or otherwise" is not a tax exempt "bequest" but taxable compensation for services rendered (Part 1, ¶4360). . . . A taxpayer who kept his books on an accrual basis, but made return for a fiscal year ending in 1918 on a cash basis for the 1917 period and on an accrual basis for the 1918 part of the year, is required to make a return for the entire year on accrual basis; so decides the United States District Court for the Southern District of New York (Part 1, ¶4365). . . . The same court holds that exempt religious, charitable, etc., organizations, which are the residuary legatees of a decedent's estate and of the net residuary income, have equitable title to any such income accruing to the estate during the period of administration but neither distributed nor credited (legal title being in the executors); therefore the income is not taxable to the estate but is tax-free—broadly speaking, the purpose of the statute is to exempt from taxation all income essentially belonging to religious, etc., corporations (Part 1, ¶4381). . . . A power of attorney is not required where an agent of a non-resident alien files claim for refund on the original return which was also filed by such agent (Part 1, ¶4399). . . . The gain derived from the sale of assets which constitute a part of the corpus of a charitable trust, which gain becomes a part of the fund to be held in perpetuity subject to the terms and conditions of the instrument creating the trust, is "permanently set aside" within the meaning of section 219(b) 1 of the Revenue Act of 1926 (Bull. V ('26)-34, page 1). . . . A reserve set up by a life insurance company to cover dividend coupons left with it and accrued interest thereon is not to be included in the computation of

allowable deductions for reserves under the 1921 Act (Bull. V ('26)-34, page 3). . . . A building and loan association, to be exempt, must loan primarily to its shareholders and here General Counsel Gregg defines the word "primarily;" reasonable emergency loans are permissible under certain circumstances (Bull. V ('26)-35, page 2). . . . The amount of attorney's fees paid for defense of an indictment for alleged violation of the anti-trust laws is not deductible as a business expense (Bull. V ('26)-36, page 6). . . . National banks located in New York State: no part of the N. Y. Income Tax (Art. 9-C of the Tax Law, effective March 31, 1927) will constitute an accrued liability in the case of an accrual basis bank, and the N. Y. tax based on 1926 income may not be deducted for taxable periods ending prior to March 31, 1927 (Bull. V ('26)-37). . . . A fiduciary who has given notice to the Commissioner that he is acting in a fiduciary capacity as provided in T. D. 3863, (Part 1, ¶4071), may execute a valid waiver of the statute of limitations on the assessment of any tax due from the person or estate for whom he acts (Bull. V ('26)-37).

The Estate Tax Regulations (No. 70) under the Revenue Act of 1926 are released September 24, 1926, and are reproduced immediately and in full in Part 2 of the Service, Page 282, et seq. . . . Regulations also are promulgated relating to the special tax on the use of foreign built boats under the 1926 Act (Part 2, Occupation Taxes, ¶7663). . . . Two memorandum rulings pertaining to excess profits taxes are handed down by the General Counsel: (1) An option to purchase the assets of a corporation, which derived its value chiefly from rights to tangible property, is held to be a tangible asset for invested capital purposes; (2) where in the case of a reorganization coming under section 330, Revenue Act of 1918, good will was in existence both during the taxable year and any prewar year and is included in invested capital for the taxable year but is not included in invested capital for such prewar year, or is valued on a different basis in computing the invested capital for the taxable year and such prewar year, respectively, the good will shall be included in invested capital for the prewar period on the same basis and at the same valuation employed in including it in the computation of invested capital for the taxable year. Where tangible property paid in to the old company for stock has appreciated in value and is paid in to the new company at a greater value for stock of the new company, the asset should be valued and included in prewar invested capital on the same basis that it is valued in computing the invested capital of the corporation for the taxable year (Bull. V ('26)-35, page 9).

Notes

Great interest has recently been aroused among corporation officials and lawyers by the organization under the laws of Delaware of a corporation to take over the stock or holdings of the Texas Company, now organized under the laws of Texas. In explanation of why Delaware was now being chosen as the company's corporate home after

its many years of existence (since its inception, in fact) as a Texas corporation, Mr. Amos L. Beaty, Chairman of the Board of the Texas Company, made a statement to the press of which the following excerpts are particularly interesting:

"Up to the present time the Texas Company has been handicapped because of the limited powers that could be exercised under the laws of Texas, particularly with reference to holding the stock of other corporations, and it was to meet this situation, as well as to provide for the future necessities of an expanding business, that the new corporation was organized and a plan of reorganization put on foot. The principal competitors of the existing company are organized in states other than Texas and enjoy the privilege of holding the stock of other corporations without limit, so long as the anti-trust laws are respected.

"An incidental advantage of this exchange is that estates of deceased stockholders in the new company, who reside outside of Texas, will not be subject to the graduated inheritance tax imposed by the laws of Texas. [Delaware does not impose an inheritance tax on stock of domestic corporations held by the estate of non-resident decedents.] At present the transfer from an estate of stock in the Texas Company, more than 90% of which is owned outside of Texas, is subject to this tax regardless of the stockholder's residence. It is fair to assume that this is reflected in the market price of the stock, which means that stockholders generally are affected.

"* * * Upon the consummation of this exchange the Texas Corporation will inaugurate a dividend rate corresponding to that of the Texas Company. The greater scope of operations and other advantages to be enjoyed by the new company, it is believed, should add to its future earnings. * * *"

As usual with organizations of this importance handled by counsel of experience, the new corporation, with an authorized capitalization of $250,000,000, is represented in Delaware by The Corporation Trust Company, and this company's cooperation was used by counsel in filing of papers.

"Two Notable Certificates of Incorporation," is the title of a new pamphlet recently issued by The Corporation Trust Company and sent to all attorneys on the mailing list of The Corporation Journal. It contains the certificates of Standard Oil Company of California and Tide Water Associated Oil Company and is proving of much interest to attorneys. Any who did not receive a copy on the original distribution may obtain one on request to any office of The Corporation Trust Company.

Merger of a number of important cement manufacturers in Pennsylvania and Kentucky was effected by the incorporation in Delaware on September 16 of the Pennsylvania Dixie Cement Corporation. The company has a capitalization of $20,000,000 of preferred stock of the par value of $100, and 1,000,000 shares of no par value common

stock. The details of incorporation in Delaware were handled for counsel, and the company is represented in Delaware, by The Corporation Trust Company.

Among the important August incorporations was that of Richfield Oil Company of California, organized in Delaware to supersede, according to press reports, the Richfield Oil Company, a California corporation, and the United Oil Company, which has controlled the Richfield through 100% stock ownership. The capital of the new company consists of 400,000 shares of preferred, par value $25, and 2,000,000 shares of common, par value $25. Incorporation papers were filed in Delaware for counsel, and the company is represented in that state, by The Corporation Trust Company.

A new chart, showing graphically how to find the requirements for transfer of stock standing in various types of names, was recently issued as a supplement to The Stock Transfer Guide and Service, and has met with enthusiastic approval of subscribers.

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330 corporations were organized under the laws of Delaware from August 20 to September 20, as against 386 for the preceding 30-day period and 377 for the corresponding period of 1925.

Some Important Matters for October and November

This calendar does not purport to cover general taxes or reports to other than state officials, or those we have been officially advised are not required to be filed. *The State Report and Tax Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

GEORGIA—Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporation.

NEW MEXICO—Annual Franchise Tax due on or before November 30.—Domestic and Foreign Corporations.

NORTH CAROLINA—Annual Franchise Fee due on or before first day of December.—Domestic and Foreign Corporations.

OHIO—Annual Franchise Tax due on or before December 1.—Domestic and Foreign Corporations.

UTAH—Corporation License Tax due between November 15 and December 15.—Domestic and Foreign Corporations

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business, The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

What Constitutes Doing Business. A 128-page pamphlet containing brief digests of 301 decisions selected from those in the various states as indicating what is construed in each state as "doing business."

Two Notable Certificates of Incorporation. Contains the certificate of Standard Oil Company of California, and that of Tide Water Associated Oil Company.

Safeguarding Stock Transfers. Dealing with the many pitfalls in transferring stock on a corporation's books, and the liability of the company's officers for making unauthorized transfers.

Delaware Corporations.—Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non-par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation.

Shares Without Par Value. Explains some of the advantages of such shares and presents brief synopses of the statutory provisions for issue in the 39 states in which they are authorized.

Paying Too Much in Taxes. Shows how taxpayers may unwittingly make themselves liable for more income tax than is necessary.

When Doing Business Is Illegal. A brief discussion, illustrated by many actual examples taken from the court records of various states, of the difference between "Interstate" and "Intrastate" business.

Revenue Act of 1926. A reprint of the law as furnished to subscribers to The Federal Tax Service of this Company.

Certificate of Incorporation of Interstate Power Company. An unusually interesting example of how both common and preferred stock without par value may be handled under the Delaware law.

New Jersey Corporations. Text of the 1926 amendments permitting stockholders' meetings to be held outside the state, and freeing stock of New Jersey corporations held by non-resident decedents (after July 1, 1926) from the state's inheritance tax.

Transfer Requirement Charts. A convenient card on which the principal requirements exacted by leading transfer agents for various classes of stock transfers are arranged in groups according to the type of name in which the stock stands.

Lawyers' Preliminary Work Sheets. Large sheets for the double purpose of reminding counsel of all the various points on which he may need information from his client before starting the preparation of incorporation papers, and furnishing a convenient medium on which to record such information in rough but systematic form for later reference.

¶ **IF litigation—between the heirs of one of your company's stockholders, or between a stockholder and an outside party—or if investigation—by an unfriendly stock interest or by a state or Federal taxing body—should require you suddenly to produce your stock records for searching legal examination, could you comply without uneasiness as to their clarity, accuracy and completeness?**

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The proper keeping of a corporation's stock records has in these days become a matter of too much consequence in too many different ways to be left to less than expert and unflagging care. The Corporation Trust Company's intimate experience with the various situations that arise in a corporation's affairs especially and peculiarly fits it to render service as transfer agent and custodian of the stock books such as brings a feeling of ease and security to a corporation's officers and directors.